Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

RICHARD J. SMITH,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Ninth Circuit's creation of the "significantly direct" test conflicts with the factors delineated in *Brown v. Illinois*, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975), for determining whether the taint of an initial illegality has dissipated under the attenuation doctrine; more specifically, must the lower courts consider: (1) the presence of intervening circumstances to break the causal chain between the initial illegality and the subsequently obtained evidence; and (2) the flagrancy of the initial illegal conduct?

PARTIES TO THE PROCEEDING

The parties to the proceedings below were petitioner/ defendant Richard J. Smith and respondent/ plaintiff the United States of America.

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No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1998

RICHARD J. SMITH
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

Petitioner Richard J. Smith respectfully prays that a writ of certiorari issue to review the judgment and the opinion of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled proceedings on August 25, 1998.

I.

OPINIONS BELOW

The published opinion of the Court of Appeals for the Ninth Circuit is reprinted herein as Appendix A. This decision is reported at 155 F.3d 1051 (9th Cir. 1998). Excerpts from the district court hearing on the motion to suppress are reprinted herein as Appendix B.

II.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1). The judgment and opinion of the United States Court of Appeals for the Ninth Circuit was entered on August 25, 1998. The jurisdiction of the district court was invoked under United States Constitution Article III, Section II, and 15 U.S.C. Sections 78j(b) and 78ff.

III.

STATUTES

Title III, 18 U.S.C. Sections 2510, *et seq.*, contains the following exclusionary provision:

> "Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing or other proceeding in or before any court, grand jury, department, officer agency, regulatory body, legislative committee, or other authority of the United States."

18 U.S.C. Section 2515 ("Section 2515").

IV.

STATEMENT OF THE CASE

The decision below of the Court of Appeals for the Ninth Circuit conflicts with the Supreme Court's decision in *Brown v. Illinois*, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975), as well as the decisions of the Fifth, Seventh and District of Columbia Circuits as to the factors to be considered in assessing whether, on a motion to suppress, the taint of an initial illegality has dissipated under the attenuation doctrine. *See, United States v. Miller*, 146 F.3d 274, 279 (5th Cir. 1998); *United States v. Jerez*, 108 F.3d 684, 694 (7th Cir. 1997); *United States v. Chavez-Villarreal*, 3 F.3d 124, 128 (5th Cir. 1993); *United States v. Scios*, 590 F.2d 956, 961-964 (D.C. Cir. 1978). *Brown*, and the cases which adhere to it, recognize the importance of two key factors integral to the attenuation analysis following an initial finding of illegality: (1) the presence of intervening circumstances to break the causal chain between the initial illegality and the subsequently obtained evidence; and (2) the flagrancy of the initial illegal conduct. These factors were not considered by the court below. In addition, the decision below conflicts with pre-existing Ninth Circuit authority.

The decision below adopts a new standard for determining the dissipation of taint which is both vague and unworkable, and conflicts with the clear standards set forth in *Brown* and decisions from other Circuits which adhere to the principles set forth in *Brown*. While the district court and the Ninth Circuit decisions each sought to apply the vague "significantly direct" test previously enunciated by the Ninth Circuit, both courts failed to consider the well-established and

analytically sound factors set forth in *Brown* in determining whether evidence is "derived from" an illegal wiretap within the meaning of Title III, 18 U.S.C. Sections 2510, *et seq.* In so doing, the decision below has radically undermined and drastically altered the way in which lower courts approach the application of the attenuation doctrine in motions to suppress. Moreover, the decision, if left intact, will effectively eviscerate the unambiguous exclusionary language of Section 2515, and will materially weaken the unequivocal protections afforded to individual privacy intended by Congress in adopting Title III.

Proceedings At The District Court

At the district court, Richard J. Smith was convicted on eleven counts of "insider trading" under 15 U.S.C. Sections 78j(b) and 78ff [1]. The government's investigation of Smith was conducted on the basis of evidence derived from an illegal wiretap within the meaning of Title III, Sections 2510, *et seq.* Both at the trial court and on appeal in the Ninth Circuit, Smith sought the suppression of the government's evidence under the statutory exclusionary provisions of Section 2515, which expressly prohibit the use of *any* evidence obtained from violations of Title III in any civil or criminal proceedings.

The indictment alleged that due to his management position at PDA Engineering, Inc. ("PDA" or the "Company"), Smith became aware of internal company forecasts during the spring of 1993 which predicted that PDA

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[1] Smith was also charged with obstruction of justice (Count Twelve of the Indictment). That count was ultimately dismissed by the district court.

would not earn as much in the fourth quarter of its fiscal year 1993 as it had previously anticipated. It further alleged that Smith sold, and sold short, PDA stock based on this information. The evidence produced at trial concerned internal PDA revenue forecasts and Smith's PDA stock trades.

The evidence produced by the government, and, indeed, the entire investigation of Smith leading up to his indictment, however, derived from an illegal wiretap within the meaning of Title III, 18 U.S.C. Sections 2510, *et seq.* In June of 1993, Smith left a confidential voice mail message for a co-worker. Among other things, the message specifically referred to members of PDA's management, PDA's revenue shortfall, and Smith's stock trades. Another PDA employee intentionally, and without authorization, intercepted the message. After the contents of the message were turned over to the United States Attorney's Office, the Securities and Exchange Commission ("SEC") utilized the information on the voice mail message to initiate and direct an investigation of Smith for insider trading violations. During that investigation, the SEC subpoenaed numerous documents relating to the financial condition of PDA in and around the time of Smith's trades and took testimony from numerous witnesses. The SEC investigation was followed by an FBI investigation, and, ultimately, a criminal indictment.

Smith brought a pretrial motion to suppress, at which the facts were largely undisputed. In June of 1993, PDA maintained a "voice mail" system which enabled telephone messages to be sent to PDA employees and electronically stored in an individual employee's "mail box." To protect the privacy and security of voice mail messages, the system utilized multi-digit access codes or "passwords."

On or about June 19, 1993, Smith left a voice mail message for PDA employee Angela Bravo de Rueda ("Bravo") in Bravo's voice mail box. Unbeknownst to Bravo, Linda Alexander-Gore ("Gore"), another PDA employee, had surreptitiously obtained the password for Bravo's mailbox. Gore used the password to hack into Bravo's voice mailbox and intercept and record the voice mail message Smith left for Bravo. Gore did not obtain permission to listen to or to record the message from either Smith or Bravo.

The message stated in relevant part:

> "Hi, Angie, Rich. . . . Tomorrow I'm just going to go to the office and get some things done and get prepared for next week, the last of — the next two weeks are the last of the quarter of the year. Anyway, I talked to Tom last night after I left you some messages and he and Lou discovered that there was about a million and a half dollar mistake in the budget, so now we're back at ground zero and we've got to scramble for the next few days. Anyway, finally I sold all my stock off on Friday and I'm going to short the stock because I know its going to go down a couple of points here in the next week as soon as Lou releases the information about next year's earnings. I'm more concerned about this year's earnings actually."

After recording the message, Gore approached Dr. Robert Phillips ("Phillips"), another PDA employee, and told him the general nature of the contents of the communication and the

method of the intercept. Gore then provided Phillips with a cassette recording of the intercepted communication.

After listening to the recording, Phillips telephoned the United States Attorney's Office for the Central District of California on June 29, 1993. Phillips spoke with Assistant United States Attorney ("AUSA") Bart Williams. Phillips explained to AUSA Williams that the message on the tape indicated possible securities violations and told him how he came to possess the tape. Phillips and Williams spoke for approximately one-half hour. At Williams' request, Phillips replayed the tape four times during the telephone call. Williams questioned Phillips regarding the identity of the voice on the tape. Williams questioned Phillips about the parties mentioned therein. He also inquired about Smith's position, duties, and responsibilities at PDA. Phillips offered to send AUSA Williams a copy of the tape, but AUSA Williams declined the offer.

After AUSA Williams' conversation with Phillips, the Department of Justice conveyed the information derived from the voice mail to the SEC. Based on that information, the SEC issued a formal order of investigation against Mr. Smith on November 30, 1993 for possible violation of the insider trading laws.

The SEC's investigation included document subpoenas to PDA. The documents obtained by the SEC supplied evidence that PDA's anticipated revenue for its software products for the fourth quarter of 1993 would not meet market expectations. The documents also revealed that Smith was aware of this revenue shortfall. These documents thus provided the evidence needed to support a case of insider trading. In addition, the SEC obtained testimony from

members of PDA senior management who were specifically identified on the tape, Tom Curry and Lou Delmonico.

Further, the SEC obtained a copy of the tape recording of the voice mail message. Thereafter, the SEC contacted the United States Attorney's Office for possible criminal prosecution.

With the information obtained from the SEC, including a copy of the tape, the United States Attorney's Office undertook to further investigate the matter. This investigation included FBI interviews of numerous witnesses.

Smith's motion to suppress the evidence was based on the ground that the evidence against Smith derived from an illegally intercepted wiretap within the meaning of the Wiretap Act, 18 U.S.C. Sections 2510 and 2515. The district court agreed with Smith that the voice mail message was illegally intercepted within the meaning of Title III. The district court, therefore, suppressed the contents of the voice mail message. The district court also found that the contents of the voice mail message was the impetus for the investigation of Smith:

> "[I]t's a lead. It does tell him that [] there appears to be a violation of the insider trading rules, because here's somebody, the sale — you may not know from the wire tap he's a sales manager of the company, they've got to I guess find that out themselves, but here's a fellow saying he had this information about what's likely to be released which he thinks will affect the stock and there's a reason he's selling and plans to sell short. . . . That

> information is the information that a crime has been committed.
>
> * * *
>
> I think it's fairly obvious that the intercepted message was the impetus for starting the investigation."

Appendix B, pages B2-B4.

Despite these factual findings, the district court refused to suppress the evidence supporting the insider trading charges (Counts One through Eleven).

Nonetheless, the district court did find that the evidence derived to support part of the government's obstruction of justice charge (Count Twelve) "derived from" the illegally intercepted voice mail message. The district court, accordingly, dismissed part 2 of Count Twelve.[2]

At trial, the government introduced documents obtained from the SEC's investigation of Mr. Smith, including, but not limited to, internal PDA documents reflecting internal forecast analysis of revenue projections and earnings. The government also introduced testimony from Tom Curry and Lou Delmonico, both of whom were referenced by Mr. Smith in the intercepted voice mail. Most importantly, the

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[2] Count Twelve involved two subparts. The first accused Smith of providing false information to the SEC concerning his sales and short sales of stock. This subpart was dismissed at trial, at the close of the government's evidence. The second subpart accused Smith of providing false information concerning his relationship with Bravo. Because a search warrant for Bravo's apartment contained a complete transcript of the illegal voice mail, the district court dismissed this subpart on the motion to suppress.

documents and the testimony revealed Smith's awareness of PDA's anticipated revenue shortfall.

Prior to turning the case over to the jury for deliberation, the district court dismissed the remaining portion of Count Twelve. The jury subsequently convicted Smith on the remaining eleven insider trading counts.

The Ninth Circuit's Decision

Smith filed a timely notice of appeal. Among other issues, Smith appealed from the district court's denial of his motion to suppress. Smith argued that the evidence produced at trial "derived from" the illegal wiretap within the meaning of 18 U.S.C. Section 2515, in that much of this evidence had a direct causal connection with the illegal wiretap.

On August 25, 1998, the Ninth Circuit affirmed Smith's conviction. The Ninth Circuit agreed with the district court that the evidence against Smith resulted from an illegal wiretap. Nonetheless, in affirming the conviction, the Ninth Circuit held that the illegal wiretap did not "significantly direct" the government's investigation of Smith. The court, however, failed to consider two key factors required by this Court's decision in *Brown v. Illinois*, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975), in assessing attenuation: the existence of intervening circumstances and the flagrancy of the initial illegal wiretap.

In addition, the Ninth Circuit specifically declined to analyze the evidence against Smith in terms of the *causal connection* between the evidence and the illegal voice mail. Further, it flatly rejected any consideration of the *impetus* given the investigation by the illegal voice mail, in direct conflict with its own prior decision in *United States v. Johns,*

891 F.2d 243 (9th Cir. 1989). By refusing to consider the causal connection, the impetus, the presence of intervening circumstances and the flagrancy of the initial illegality, the Ninth Circuit created and adopted an unworkable, confusing test for assessing attenuation which cannot be applied consistently with either the Supreme Court's decision in *Brown*, pre-existing Ninth Circuit precedent, or the overwhelming authority of other Circuits. Further, the Ninth Circuit's decision eviscerates the protections afforded individual privacy by Congress in Title III.

V.

REASONS FOR GRANTING THE WRIT

This Court Should Grant Certiorari To Remedy A Split In The Circuits Created By The Opinion Below And To Make Clear That The Lower Courts Must Consider The Factors Involving Causal Relationship And The Flagrancy Of The Initial Illegal Conduct In Determining Whether The Taint Of An Initial Illegality Has Dissipated Under The Attenuation Doctrine.

A. The Ninth Circuit's Decision Conflicts With *Brown v. Illinois.*

In *Alderman v. United States*, 394 U.S. 165, 182-83, 89 S.Ct. 961, 971-72, 22 L.Ed.2d 176 (1969), the Supreme Court adopted the *Wong Sun* test to determine whether to suppress evidence obtained as a result of an illegal interception under Title III:

> "[T]he question is whether, granting the establishment of the primary illegality, the evidence to which instant objection is made has been derived by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint."

Id.

In *Brown v. Illinois*, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975), the Court explained that all evidence derived from the exploitation of an illegal search or seizure must be suppressed unless the government demonstrates that there was a break in the causal chain sufficient to dissipate the taint. *Brown*, 422 U.S. at 597-603. The Court set forth the factors to be considered in evaluating whether evidence which would not have been obtained but for a primary illegality must be suppressed as the fruit of that illegality. *Brown*, 422 U.S. at 603-604. These factors include: (1) the temporal proximity of the illegality and the obtainment of the evidence; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the illegality. *Id.*

In determining whether evidence derived from the illegal wiretap should have been suppressed, the Ninth Circuit disregarded the *Brown* factors and instead applied the extremely vague "significantly direct" test derived from prior Ninth Circuit decisions. *Smith*, 155 F.3d at 1060-1063. Yet, the application of the analytically distinct *Brown* factors to the facts in this case demonstrates that the evidence against Smith should have been suppressed.

Although there was no close temporal proximity between the illegally obtained voice mail and the subsequently derived

evidence, the other two factors weigh heavily in favor of suppression. Here, there were no intervening circumstances. Once the government obtained the contents of the illegally obtained voice mail, it exploited the contents thereof to subpoena documents from PDA and obtain testimony from witnesses. The record at the suppression hearing showed that FBI Agent Kelley informed the SEC about insider trading in PDA. In turn, this led directly to the SEC subpoena of the records of PDA. From the PDA records, the SEC gained the factual information underlying the elements of: (1) materiality — supported by internal company memoranda concerning the shortfall in sales and revenue during the fourth quarter of 1993; and (2) scienter — also supported by internal company memoranda demonstrating that Smith knew of the shortfall in sales and revenue during the fourth quarter of 1993. The PDA records and the voice mail also led to the SEC to depose Tom Curry, the government's primary witness against Smith. Indeed, the Ninth Circuit conceded that the causal chain between the illegality and the voice mail was not broken. Consequently, there were no independent intervening factors to relieve the evidence from the taint of the illegality.

Perhaps more importantly, the flagrancy of the illegality which resulted in the government's obtaining the contents of the voice mail requires that the suppression deterrent be applied. In order to protect individual privacy in the face of increasingly sophisticated technology, Congress enacted Title III, which prohibits the unauthorized interception of wire communications. 18 U.S.C. Sections 2510-2520. To assure individual privacy, Congress directed that all evidence "derived from" an unauthorized wiretap be suppressed. 18 U.S.C. Section 2515.

Here, one of Smith's co-workers blatantly violated the prohibitions of Title III and deliberately and intentionally intercepted, without permission, Smith's private, coded voice mail. While the Ninth Circuit has held that there is no "clean hands" exception to Section 2515, *Chandler v. United States*, 125 F.3d 1296, 1298 (9th Cir. 1997), in this case, it nonetheless allowed the government to exploit the illegality under the virtually meaningless "significantly direct" standard.

In applying this nebulous standard, the court effectively provided a road map for avoiding the prohibition of Section 2515. Under the *Smith* decision, armed with illegally obtained information, a government agent may simply refer an investigation to another agent, carefully providing only the minimal facts needed to develop a full-scale case against a defendant. Later, the government agent can declare the insignificance of those facts. This result is wholly contrary to Congress' intent to protect individual privacy, and indeed threatens the integrity of the courts themselves. As Justice Frankfurter stated in an analogous context:

> "[A] conviction resting on evidence secured through such flagrant disregard of the procedure which Congress has commanded cannot be allowed to stand without making the courts themselves accomplices in willful disobedience of law . . . [T]o permit such evidence to be made the basis of a conviction in the federal courts would stultify the policy which Congress has enacted into law."

McNabb v. United States, 318 U.S. 332, 345, 63 S.Ct. 608, 615, 87 L.Ed. 819 (1943).

B. The Ninth Circuit's Decision Conflicts With Decisions Of The Fifth, Seventh And District of Columbia Circuits.

The Ninth Circuit's application of the vague "significantly direct" test also conflicts with decisions of the Fifth and Seventh Circuits which properly apply the *Brown* factors. *United States v. Miller*, 146 F.3d 274, 279 (5th Cir. 1998); *United States v. Jerez*, 108 F.3d 684, 694 (7th Cir. 1997); *United States v. Chavez-Villarreal*, 3 F.3d 124, 128 (5th Cir. 1993). In these decisions, the Fifth and Seventh Circuits held that evidence obtained subsequent to an illegal search must be suppressed where there were no intervening circumstances between the illegality and the evidence. They relied on the direct causal connection between the evidence and the illegality to hold that the evidence at issue should have been suppressed.

In addition, in *United States v. Scios*, 590 F.2d 956, 961-964 (D.C.Cir. 1978), the District of Columbia Circuit held that live witness testimony must be suppressed where the identity of the witness was obtained solely as the product of an illegal search. In *Scios*, during an illegal search the police rifled through certain files and found the name of the lead witness against the defendant, Massa. Because there were no intervening circumstances, the District of Columbia Circuit held that the witnesses' testimony should have been suppressed. The court reasoned:

> "The agents tracked the Massa lead found in that file. They did not pursue a trail independent of the illegal search . . . The location of Massa was not the product of an improbable, unforeseeable coincidence. It

> was good police work, but a straightforward exploration of the leads in the Pharmacy file."

Id. at 961. This reasoning is equally applicable to the present case. Under the analysis of *Scios*, the evidence against Smith should have been suppressed.

C. The Panel's Decision Conflicts With Ninth Circuit Precedent.

Even applying the Ninth Circuit's own test — "whether the illegal activity tends to *significantly direct* the investigation to the evidence in question," *United States v. Chamberlain*, 644 F.2d 1262, 1269 (9th Cir. 1980), *cert. denied*, 453 U.S. 914 (1981) — the Ninth Circuit's decision in the present case conflicts with its own prior decisional law.

The Ninth Circuit applied the "significantly direct" test under analogous facts in *United States v. Johns*, 891 F.2d at 245-246. There, the defendant's identity was unknown to law enforcement prior to an illegal search of his vehicle and airplane. Subsequent to the search and the identification of the defendant, law enforcement drew upon previously-obtained information concerning the defendant and began surveillance of one of the defendant's associates. The surveillance of the associate led to the seizure of marijuana introduced against the defendant at trial. In determining that the investigation of the defendant was tainted, the court further defined the analysis under the "significantly direct" test, employing two factors relevant here.

One of the factors the court considered was the direct causal connection between the illegal search and the evidence produced: "The focus is on the *causal connection between the illegality and the evidence.*" *Johns*, 891 F.2d at 245 (*quoting*

Chamberlain, 644 F.2d at 1269) (emphasis added). Indeed, the Ninth Circuit, in line with the reasoning of *Brown* has long held that an examination of the causal connection between the illegality and the evidence is essential to the taint analysis. *Chamberlain*, 644 F.2d at 1269. Thus, in *Johns*, after considering the direct causal relationship between the illegal search, the subsequent surveillance of the defendant's associate, and the discovery of the marijuana produced against the defendant at trial, the Ninth Circuit determined that the evidence was not sufficiently attenuated. *See also United States v. Ramirez-Sandoval*, 872 F.2d 1392, 1397 (9th Cir. 1989) (courts must consider whether the witnesses would have come forward on their own without the illegally-obtained evidence).

Another factor the *Johns* court considered was the type of impetus supplied by the illegally-obtained evidence. *Johns*, 891 F.2d at 245-56. Where the illegality is the direct impetus for the subsequent investigation, evidence obtained in that investigation is tainted. *Id.* Again, *Johns* is not alone in analyzing impetus. For example, in *United States v. Taheri*, 648 F.2d 598, 600-601 (9th Cir. 1981), the Court held that heroin obtained as a result of an illegal seizure was the direct impetus for a subsequent "alert" by a detector dog, the defendant's subsequent arrest, and opium obtained from the defendant pursuant to a consent search. In suppressing the evidence against the defendant, the Ninth Circuit reasoned:

> "In this case, the illegally gained knowledge that the substance in the package was heroin *formed the impetus* for the use of the detector dog. The dog's alert therefore cannot be considered an independent source which removed the taint of the original illegal search.

> The initial search was part of the same criminal investigation leading to this prosecution and revealed the same evidence which was the subject of the motion to suppress."

Id. (emphasis added). *Accord United States v. Cales*, 493 F.2d 1215 (9th Cir. 1974) ("The district court must seek to discover what kind of direction and impetus the illegal wiretap gave to the Cales investigation."); *United States v. Bacall*, 443 F.2d at 1056 (9th Cir. 1971) ("[I]t may be crucial to a determination of taint that, at the time of their initial illegal action, the officers had no reason to suspect the defendant of any crime.")[3]

In light of *Johns, Ramirez-Sandoval, Taheri, Cales,* and *Bacall,* the Ninth Circuit's rejection in *Smith* of the criteria of impetus and causal connection as tools for analyzing taint should be reviewed. By merely reiterating the language "significantly direct" without any meaningful criteria for applying that test, the *Smith* court has effectively eviscerated the prohibition against use of evidence *derived from* an illegal wiretap contained in Section 2515. Instead, the Ninth Circuit's analysis of the issue of taint should comply with *Brown* and consider both whether any intervening circumstances occurred to purge the taint and the flagrancy of the initial illegality.

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[3] The fact that the *Smith* court relied upon *United States v. Cella*, 568 F.2d 1266 (9th Cir. 1978) in rejecting any consideration of impetus only makes the intra-circuit conflict more distinct.

VI.

CONCLUSION

By misapplying the already vague "significantly direct" test rather than the analytically distinct *Brown* factors to determine whether evidence is "derived from" an illegal wiretap, the Ninth Circuit has eviscerated the explicit exclusionary provisions of 18 U.S.C. Section 2515, and thus has undermined the safeguards put in by Congress to protect our citizenry from unlawful intrusions on individual privacy.

For these reasons, and as stated above, petitioner Richard Smith requests the Court to issue a writ of certiorari to review the decision of the Court of Appeals for the Ninth Circuit.

DATED: November 23, 1998.

Respectfully submitted,

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